

Department of the Navy, DoD

§ 701.65

(b) *Public inspection.* when feasible, Department of the Navy and Department of Defense documents published in the FEDERAL REGISTER should be made available for inspection and copying, along with available indexes of such documents, in the same locations used for copying of the documents contemplated in § 701.65.

§ 701.65 Availability, public inspection, and indexing of other documents affecting the public.

(a) *Discussion.* Section 552(a) of title 5, United States Code, requires the Department of the Navy to make available for public inspection and copying documents which have precedential significance on those Department of the Navy decisions which affect the public. These documents must be kept readily available for public inspection and copying at designated locations, unless they are promptly published and copies are offered for sale. Additionally, documents issued after July 4, 1967, are required to be indexed on a current basis. These indexes, or supplements thereto, must be published at least quarterly in accordance with the provisions of this paragraph. In determining whether a particular document is subject to the requirements of this paragraph, consideration should be given to the statutory purposes and legal effect of the provisions.

(1) *Statutory purposes.* In general, the purpose of the requirement to provide members of the public with essential information is to enable them to deal effectively and knowledgeably with Federal agencies; to apprise members of the public of the existence and contents of documents which have potential legal consequences as precedents in administrative determinations which may affect them; and to permit public examination of the basis for administrative actions which affect the public.

(2) *Legal effect.* If a document is required to be indexed and made available under this paragraph, it may not be used or asserted as a precedent against a member of the public unless it was indexed and made available, or unless the person against whom it is asserted had actual and timely notice of its contents.

(b) *Classes of documents affected.* (1) Subject to the provisions of 5 U.S.C. 552(b) which exempt specified matters from the requirements of public disclosure, the following classes of Department of the Navy documents are included in the requirements of this paragraph:

(i) *Final adjudicative opinions and orders*—opinions (including concurring and dissenting opinions) which are issued as part of the final disposition of adjudication proceedings (as defined in 5 U.S.C. 551) and which may have precedential effect in the disposition of other cases affecting members of the public;

(ii) *Policy statements and interpretations*—statements of policy and interpretations of less than general applicability (i.e., applicable only to specific cases; organizations, or persons), which are not required to be published in the FEDERAL REGISTER, but which may have precedential effect in the disposition of other cases affecting members of the public;

(iii) *Manuals and instructions*—administrative staff manuals, directives, and instructions to staff, or portions thereof, which establish Department of the Navy policy or interpretations of policy that serve as a basis for determining the rights of members of the public with regard to Department of the Navy functions. In general, manuals and instructions relating only to Internal management aspects of property or fiscal accounting, personnel administration, and most other “proprietary” functions of the department are not within the scope of this provision. This provision also does not apply to instructions for employees on methods, techniques, and tactics to be used in performing their duties; for example:

(A) Instructions or manuals issued for audit, investigation, and inspection purposes;

(B) Those which prescribe operational tactics; standards of performance; criteria for defense, prosecution, or settlement of cases; or negotiating or bargaining techniques, limitations, or positions; and

(C) Operations and maintenance manuals and technical information concerning munitions, equipment, and

systems, and foreign intelligence operations.

(2) In determining whether a document has precedential effect, the primary test is whether it is intended as guidance to be followed either in decisions or evaluations by the issuing authority's subordinates, or by the issuing authority itself in the adjudication or determination of future cases involving similar facts or issues. The kinds of orders or opinions which clearly have precedential effect are those that are intended to operate both as final dispositions of the questions involved in the individual cases presented, and as rules of decision to be followed by the issuing authority or its subordinates in future cases involving similar questions. By contrast, many adjudicative orders and opinions issued within the Department of the Navy operate only as case-by-case applications of policies or interpretations established in provisions of manuals or directives and are not themselves used, cited, or relied on as rules of decision in future cases. In these instances, the underlying manual or directive provisions obviously would have precedential effect, but the orders and opinions themselves would not have. A recommendation by an official who is not authorized to adjudicate, or to issue a binding statement of policy or interpretation in a particular matter would not have precedential effect though an order, opinion, statement of policy, or interpretation issued by an authorized official pursuant to such recommendation might have that effect.

(c) *Deletion of identifying details.* (1) Although the exemptions from public disclosure described in 5 U.S.C. 552 and subpart B of this part are applicable to documents which are required to be indexed and made available for public inspection and copying under this paragraph, there is no general requirement that any segregable portions of partially exempt documents be so indexed and made available for public inspection and copying. As a general rule, a record may therefore be held exempt in its entirety from the requirements of this paragraph if it is determined that it contains exempt matter and that it is reasonably foreseeable that disclosure would be harmful to an interest

protected by that exemption. An exception to this general rule does exist with regard to a record which would be exempt only because it contains information which, if disclosed, would result in a clearly unwarranted invasion of privacy.

(2) Where necessary to prevent a clearly unwarranted invasion of a person's privacy, identifying details should be deleted from a record which is required to be indexed and made available for public inspection and copying under this paragraph. In every such case, the justification for the deletion must be fully stated in writing in a manner which avoids creating inferences that could be injurious to the person whose privacy is involved. Usual reasons for deletion of identifying details include the protection of privacy in a person's business affairs, medical matters, or private family matters; humanitarian considerations; and avoidance of embarrassment to a person.

(d) *Publication of indexes*—(1) *Form of indexes.* Each index should be arranged topically or by descriptive words, so that members of the public may be able to locate the pertinent documents by subject, rather than by case name or by a numbering system.

(2) *Time of publication.* Each component having cognizance of records required under this paragraph to be indexed shall compile and maintain an index of such records on a continually current basis. Each such index was required to initially be published by July 1, 1975. An updated version of each such index, or a current supplement thereto, shall be published by an authorized method at least annually thereafter.

(3) *Methods of publication.* The methods authorized for publication of the indexes contemplated in this paragraph are:

(i) Publication in the FEDERAL REGISTER;

(ii) Commercial publication, provided that such commercial publication is readily available to members of the public, or will be made available upon request, and payment of costs (if this method is utilized, information on the cost of copies and the address from which they may be obtained shall be published in the FEDERAL REGISTER); or

(iii) Furnishing internally reproduced copies upon request, at cost not to exceed the direct cost of duplication in accordance with subpart D of this part, provided that it is determined by an order published in the FEDERAL REGISTER, that the publication of the index by methods § 701.65(d) (3) (i) or (ii) would be unnecessary or impracticable. Such order shall state the cost of copies and the address from which they may be obtained. The Chief of Naval Operations (N09B30) is authorized to issue such an order in a proper case.

(4) *Public inspection of indexes.* In addition to publication by one of the foregoing methods, each index will be made available for public inspection and copying in accordance with § 701.65(e) at the locations where Department of the Navy records are available for public inspection.

(e) *Where records may be inspected.* Locations and times at which Department of the Navy records, and indexes thereof, are available for public inspection and copying are shown in § 701.32.

(f) *Cost.* Fees for copying services, if any, furnished at locations shown in § 701.32 shall be determined in accordance with subpart D of this part.

(g) *Records of the United States Navy-Marine Corps Court of Military Review.* The United States Navy-Marine Corps Court of Military Review is deemed to be “a court of the United States” within the meaning of 5 U.S.C. 551 and is therefore excluded from the requirements of 5 U.S.C. 552. Nevertheless, unpublished decisions of the United States Navy-Marine Corps Court of Military Review, although not indexed, are available for public inspection at the location shown in § 701.32(c).

§ 701.66 Publication of proposed regulations for public comment.

(a) *Discussion.* The requirements of this section are not imposed by statute, but are the implementation of policies and procedures created administratively in 32 CFR part 336. In effect, the pertinent provisions of 32 CFR part 336 establish, within the Department of Defense and its components, procedures that are analogous to the public rulemaking procedures applicable to some functions of other Federal agencies under 5 U.S.C. 553. While the ad-

ministrative policy of encouraging the maximum practicable public participation in the Department of the Navy rulemaking shall be diligently followed, determinations by the Department of the Navy as to whether a proposed regulatory requirement originated by it comes within the purview of this paragraph and the corresponding provisions of 32 CFR part 336, and as to whether inviting public comment is warranted, shall be conclusive and final.

(b) *Classes of documents affected.* Each proposed regulation or other document of a class described in § 701.64(a) (or a proposed revision of an adopted document of any of those classes) which would “originate” within the Department of the Navy a requirement of general applicability and future effect for implementing, interpreting, or prescribing law or policy, or practice and procedure requirements constituting authority for prospective actions having substantial and direct impact on the public, or a significant portion of the public, must be evaluated to determine whether inviting public comment prior to issuance is warranted. Documents that merely implement regulations previously issued by higher naval authorities or by the Department of Defense will not be deemed to “originate” requirements within the purview of this section. If a proposed document is within the purview of this section, publication to invite public comment will be warranted unless, upon evaluation, it is affirmatively determined both that a significant and legitimate interest of the Department of the Navy or the public will be served by omitting such publication for public comment, and that the document is subject to one or more of the following exceptions:

(1) It pertains to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy;

(2) It relates to naval management, naval military or civilian personnel, or public contracts (e.g. Navy Procurement Directives), including non-appropriated fund contracts;